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SUPREME COURT OF THE UNITED

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OCTOBER TERM, 1942

No. 1013

KELLEY, GLOVER & VALE, INC., J. J. KELLEY,
W. J. GLOVER, JR., AND MILO F. VALE,
Petitioners,

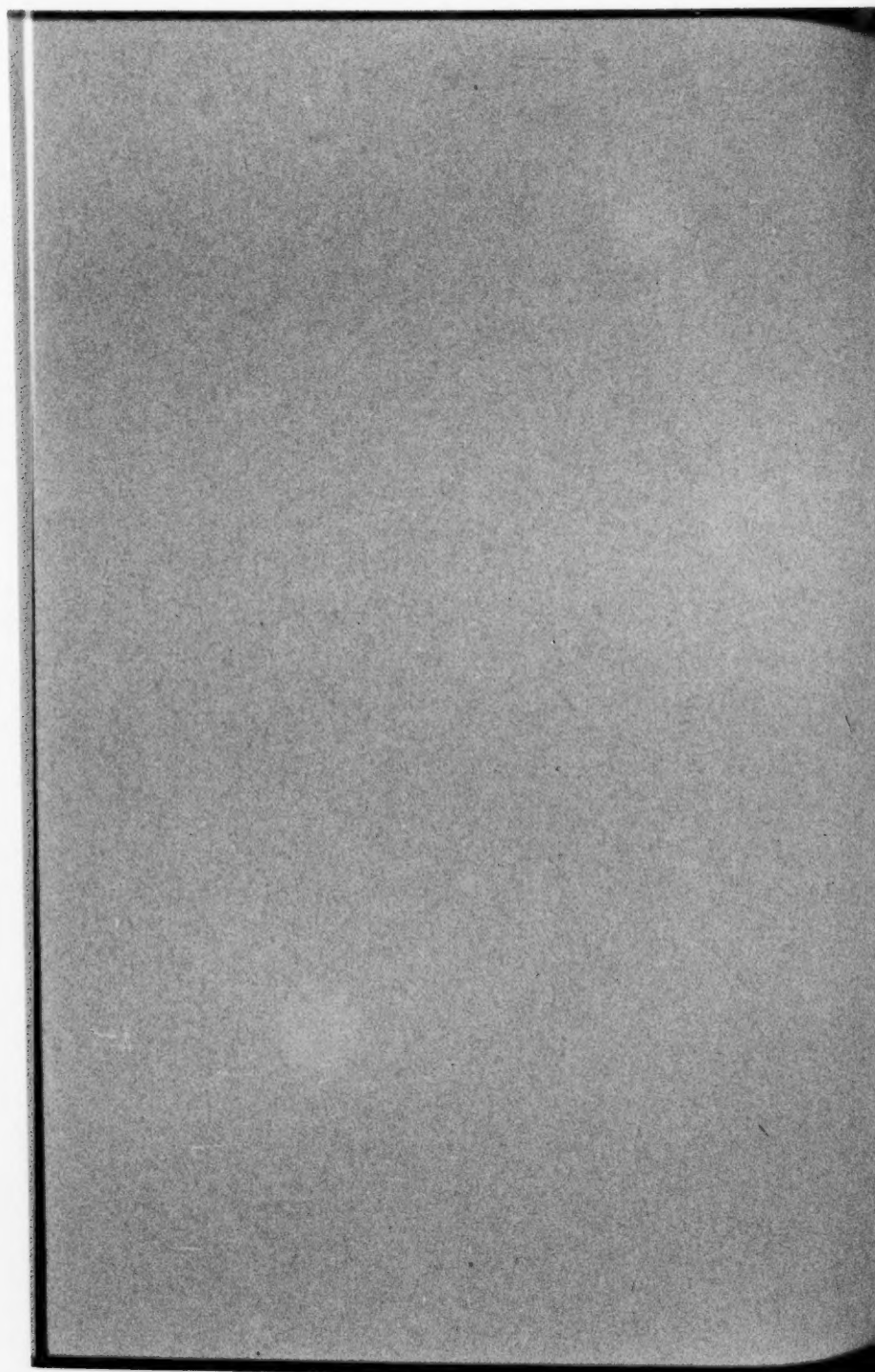
vs.

ELMER W. HEITMAN, RECEIVER OF FIRST NATIONAL BANK
OF GARY, INDIANA, AND WILLIAM S. RITMAN, SUC-
CESSOR RECEIVER OF SAID BANK.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF INDIANA.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSI-
TION TO PETITION FOR WRIT OF CERTIORARI.

GILBERT GRUENBERG,
JOHN W. LYDDICK,
JOHN F. ANDERSON,
Counsel for Respondents.



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**BRIEF OF RESPONDENTS IN OPPOSITION TO PETI-
TION FOR WRIT OF CERTIORARI.**

Come now Elmer W. Heitman, Receiver of First National Bank of Gary, Indiana, and William S. Ritman, Successor Receiver of said Bank, the respondents in the above entitled case and present this their brief in opposition to the Petition for Writ of Certiorari and in support thereof respectfully show :

A.

Statement of the Facts.

This action was commenced April 8, 1940, upon a Complaint in equity seeking judgment on a collateral note which the appellee Heitman was holding as Receiver of First National Bank of Gary, Indiana.

The note sued upon was in the principal sum of approximately Thirty Thousand (\$30,000.00) Dollars and foreclosure was sought on the collateral security in the sum of Thirty Thousand (\$30,000.00) Dollars worth of first mortgage real estate bonds which had been deposited as collateral to said note, together with other assets. The court found the facts specially and stated its conclusions of law thereon and rendered judgment against the defendants.

Appeal was taken to the Appellate Court of Indiana and the judgment of the trial court was reversed and judgment rendered in favor of the defendants on their counter claim, in the sum of approximately Twelve Thousand (\$12,000.00) Dollars.

After the Appellate Court denied a rehearing, the appellee filed a Petition for transfer to the Supreme Court of Indiana, which was granted. It is true that this Petition was granted within seven (7) days after the same was filed. Petitioners charge they were not give an opportunity to answer this Petition, but no answer is contemplated under the rules of the Court.

This Petition is simply in the form of a Motion and briefs may be submitted pro and con. Jurisdiction to grant the request is complete upon the filing of the Motion. Furthermore, as pointed out in the petitioners' own Petition, on Page 2, petitioners, after the time to file briefs expired, then filed a Motion to vacate the transfer order, citing in support thereof a number of cases (Record Pages 102 to 105).

This Motion to vacate served in effect as an answer brief, upon the Motion to transfer.

It would seem therefore that the petitioners certainly exercised their right to brief and argue the matter.

After the granting of the Petition to transfer, the Supreme Court, heard oral arguments and then sustained the

judgment of the trial court and set aside the judgment of reversal of the Appellate Court.

Appellants then filed a Petition for rehearing, in the Supreme Court of Indiana. *In that Petition for rehearing appellants claimed and raised for the first time matters which they thought amounted to Federal questions and which they now claim gives them the right to a writ of certiorari.* That Petition for rehearing was denied without opinion. These questions are three fold, as set out in the Petition submitted herewith:

1. The petitioners charge that they were denied equal protection of law by the action of the Supreme Court of Indiana, in denying them the right to submit argument or brief upon the question of the granting of the Petition to transfer from the Appellate Court of Indiana to the Supreme Court.

2. As set out in the Petition, IIA, petitioners charge that they are denied due process and equal protection of law, by the failure of the Supreme Court of Indiana to follow the established precedent as to what constitutes conclusions of law and what constitutes findings of fact.

3. As set out in the Petition, IIB petitioners further claim that the Supreme Court failed to follow the facts as shown by the record in entering its opinion, which constitutes a denial of due process and equal protection of the law.

B.

Discussion.

We submit that the Petition for Certiorari should be denied for five reasons:

1. The Federal question was raised too late to warrant a review by this Court.

2. No substantial Federal question is raised by the record.

3. The record fails to show that any Federal question involving the obligation of contracts was necessarily decided by the Indiana Supreme Court.

4. The record fails to show that any Federal question involving a denial of due process was necessarily decided by the Indiana Supreme Court.

5. The record does not present for decision any substantial Federal question. The state court did not decide a Federal question of substance. Neither did it decide such a Federal question contrary to applicable decisions of this court. Hence, there is nothing before this court in the petition for a writ.

I

"The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it * * *"

Herndon v. Georgia, 295 U. S. 441, 443.

Certainly it can not now be contended that the action of the State Court could not be anticipated for the entire brief of the appellee is a prayer for just such an opinion as was rendered.

Failure to raise the federal question until petition of rehearing is filed, which is denied without opinion, comes too late, unless the action of the State court in its opinion could not be anticipated.

American Surety Co. v. Baldwin, 287 U. S. 156, 163, 164.

II

No substantial Federal question is presented. The petitioners charge in effect that the Supreme Court of Indiana discriminated against them in three specific instances:

1. In granting the Petition to transfer without allowing them to argue or brief that question.

2. In failing to follow the established law of Indiana as to what constitutes findings of fact and what constitutes conclusions of law.

3. In disregarding the certain findings of facts which petitioner contends would preclude the judgment rendered. It will be noted that the gist of all those objections and the basis for the claim that a Federal question is involved is predicated upon the proposition that the Supreme Court of Indiana, in the instant case, failed and refused to follow the established law of Indiana. It is respectfully submitted that such a claim is not a sufficient basis for Federal question. In the case most nearly in point, it was held that a charge that the State Court did not follow its established rule of practice could give no rise to a charge that the unsuccessful party, by reason of that, was deprived of property without due process, or denied equal protection of law. The question presented was the following:

“Is not a judicial decision refusing to apply to this contract the general provision of the law of contracts prevailing in the State, a taking * * * of the property of the defendant corporation without due process of law?”

The Court disposing of this question among others, stated:

“They (the questions) are all based upon the proposition that the judicial determination of these particular questions by the State tribunal was erroneous and on account of such error the rights of the plaintiff in error under the Federal Constitution have been violated. But mere error in deciding question of this nature furnishes no ground of jurisdiction for this Court to review the judgment of the State Court.”

The Court concluded:

"The claim has * * * no colorable foundation."

New Orleans Water Works Co. v. La., 185 U. S. 336, 344, 351, 352.

The contention of the petitioners herein that by virtue of the fact that the Supreme Court of the State of Indiana failed to be consistent or committed error in deciding the case contrary to precedent established by itself, gives rise to no constitutional or Federal question.

"In any case the Constitution of the United States does not guarantee that the decisions of the State Court shall be free from error * * * or require that pronouncement shall be consistent."

Worcester County Trust Co. v. Riley, 302 U. S. 292, 299;

See *Milwaukee Electric Ry. & Light Company v. Wisconsin*, 252 U. S. 100.

The case of *Fisk v. Kansas*, 274 U. S. 380, 385 has no application in the instant case. The rule of that case applies only where a Federal question is admittedly an issue and the State Court in trying to circumvent the litigants' rights makes a finding wholly unsupported by the evidence which deprives him of the privilege of asserting such right.

In the instant case the petitioners are trying to predicate the Federal question upon a failure to follow the evidence or findings of the lower Court. That, it is submitted, is purely a question for the State Court. *If the rule advocated by the petitioners were invoked, every State decision would be appealable to this Court, on the ground that the Court of last resort of such State failed to follow the facts in evidence or the established State law upon the questions,*

(In passing it may be noted that the rules for transfer from the Appellate Court to the Supreme Court of Indiana

indicate that jurisdiction is acquired without the submission of briefs. Note Rule F on Page 7 of Petition filed herein:

"If briefs are filed they shall be separate from and filed with the Petition but that shall not be necessary to invoke the action of the Court on the Petition."

Petitioners claim that the subsequent opinion of the Indiana Supreme Court did not point out anything in the Appellate Court's decision which contravened a ruling precedent or erroneously decided a new question of law. This was not necessary, and is never done.

In the cases cited in the Petition on Page 8 thereof it is expressly pointed out that once the transfer is granted the matter then pends in the Supreme Court, "in like manner and in all intents and purposes as though it had been appealed directly to the latter Court."

Kraus v. Lehman, 107 Ind. 408, Page 422.)

It follows therefore that once transfer is made the Court is no longer concerned with the grounds for transfer and the cause is submitted as a new appeal.

C.

Conclusion.

In conclusion it is respectfully submitted that Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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JOHN W. LYDDICK,
JOHN F. ANDERSON,
Counsel for Respondents.